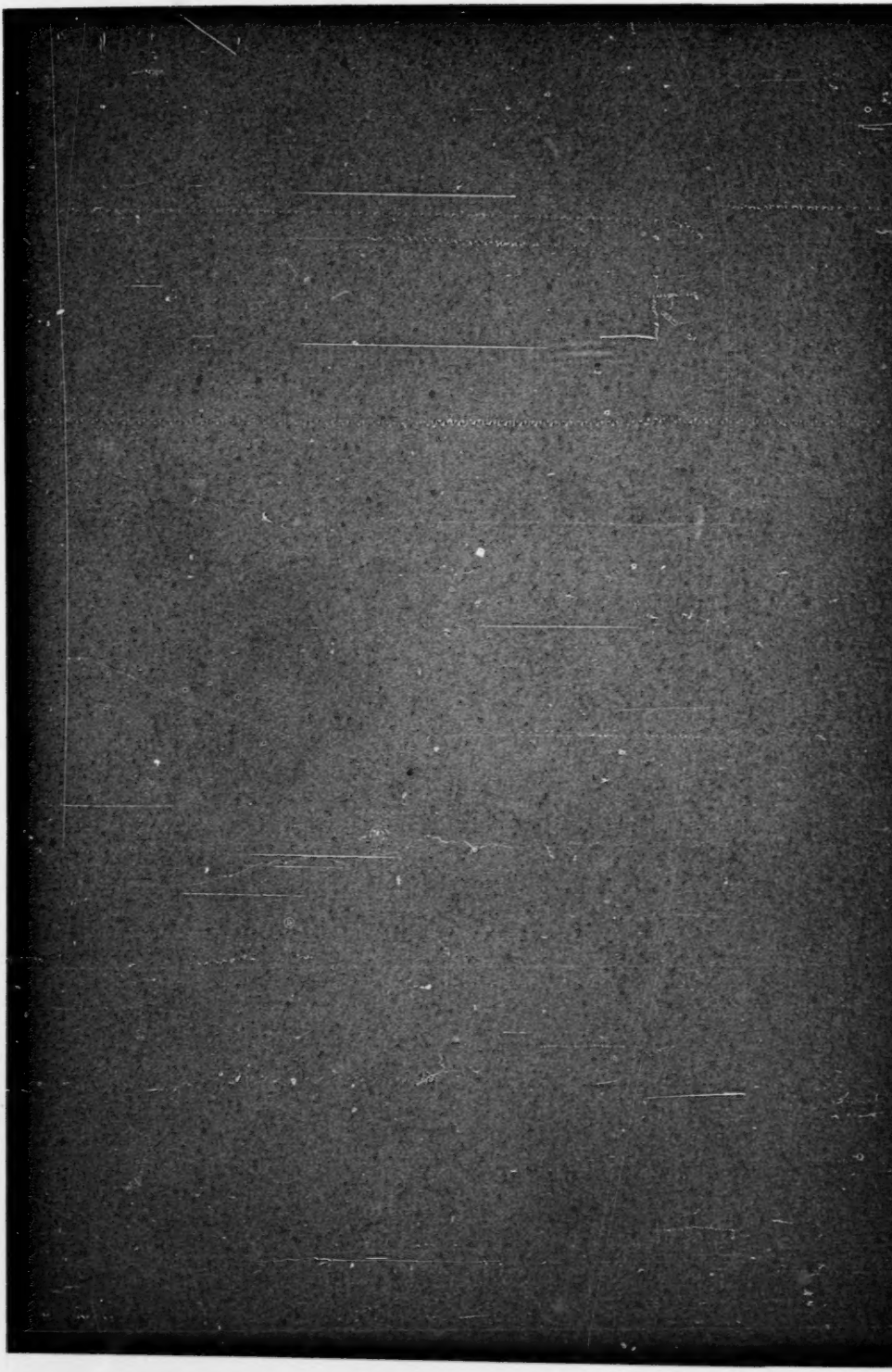

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IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-6

ANCHOR MOTOR FREIGHT, INC.,
Petitioner,

vs.

WILLIAM SCOTT,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF WILLIAM SCOTT IN OPPOSITION

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. When an employer, acting in bad faith in order to terminate an employee it dislikes, coerces a company doctor to change his professional opinion and erroneously declare, contrary to medical knowledge, that the employee is not qualified to drive, may the court sustain a jury verdict holding the employer to have acted unjustly in breach of a labor agreement which forbids wrongful discharge?

2. Where the union controls the grievance procedure and where the jury found that the employee complied with the procedure by filing his grievance with the union by certified mail and that the union was guilty of unfair representation, was there sufficient evidence of a reasonable attempt to exhaust remedies as to permit suit against the employer for breach of contract under the doctrine of *Vaca* v. *Sipes*?

STATEMENT OF THE CASE

This was an action for wrongful discharge in breach of a labor agreement.

Plaintiff William Scott had thirteen years seniority as a truck driver for Defendant Anchor at the time of his discharge in July, 1966. Through diet, oral medication and an understanding of his condition, Scott had been able to control his mild diabetes, which had never interfered with his driving (203).[1] Each and every year since the onset of diabetes in 1959, he had met ICC standards and was certified as a qualified driver (200) and his condition was well known by the company (204).

On May 6, 1966 and again on June 21, 1966, he was examined by the company doctor, Louis Ralston, and found to be qualified under ICC rules and was given an ICC certificate (220, 602, 603). On July 6, 1966, Dr. Ralston wrote:

> "He is qualified as a driver under normal ICC requirements." (604).

The company was angry at Scott because he had recently filed ten pay claims and other miscellaneous complaints

[1] References are to the pages of the trial transcript reproduced in the joint appendix in the Court of Appeals.

with the company (222-229, 619). His disputes with the company reached a climax on June 17, 1966, when he was reprimanded for alleged "insubordination" (491).

Company officials were anxious to get rid of Scott. They were not satisfied with the doctor's admonition that if the company wanted to fire Scott, it would have to impose "more rigid requirements than the minimum ICC requires." (604). Company Safety Director Thomas then suggested to his assistant that "he contact Ralston to see if he would change his doctor's statement" (483-484).

Thomas wrote:

> "I suggested to Bob (DeLeo) that he contact Dr. Ralston to see if he would want to change his statement concerning the driver's qualifications . . . it is my opinion that Dr. Ralston will want to change his opinion . . ." (634).

Thomas's insistence that the doctor change his opinion was not based on any medical wisdom possessed by Anchor officials, who admitted they knew nothing about diabetes or the details of Scott's condition (509, 482, 489, 515). The jury could reasonably infer that the motive for pressuring the doctor was the company's dislike of Scott.

In any event, Dr. Ralston succumbed to the pressure from Anchor and wrote a letter alleging that Scott's oral medication could cause adverse effects which would make him a safety hazard. This opinion was contrary to medical knowledge and ICC practice and was promulgated without any new examination or new facts or investigation and was at odds with his previous report. Within a few hours after receipt of the new report, the company fired Scott, without any further background inquiries or investigation or opportunity for Scott to explain his condition or "warning notice of the complaint" as required by Article 32 (608).

At the time of the discharge, there was a "sweetheart" collusive relationship between the company and union (Local 377 Teamsters) (58). The union was providing virtually no representation. There was no steward or grievance committee operating, even though sanctioned by contract (209, 399, 471, 543). The Court of Appeals noted that at the time "Local 377 did not have the requisite machinery to process a grievance." Neither the company nor union had distributed copies of the labor agreement to the drivers and none were available (471, 543). Union representatives Angelo and Schwartz, who subsequently were convicted of federal crimes (139), had received personal favors from the Anchor terminal manager (62, 63, 114, 115). Angelo had shown personal hostility to Scott and the Anchor drivers from Ohio and Kentucky, whom he called "hillbillies" (233, 542).

Immediately after his discharge, Scott went to the company premises to protest the discharge, left his name, and was denied access (234). During the two weeks following his discharge, the company terminal was shut down because of vacation (89).

In accordance with normal practice, Scott filed several copies of his grievance with the union and requested a hearing (621, 528, 532). He understood that the union would file a copy of the grievance with the company, and the union assured him he would get a hearing (238, 313, 155). The union received the grievance by certified mail, within a sufficient time to file a timely grievance with the company (624). During the weeks and months after his discharge, Scott made inquiries concerning his grievance (212, 238, 313, 152, 320, 541.) In 1967, Scott wrote to the company and union requesting information regarding the status of the grievance (617). Neither company nor union replied. The union, during all this time, had failed to file

the grievance with the company or request a hearing and had totally failed to provide any help or representation for Scott.

Suit for breach of contract and unfair representation was filed April 4, 1968. Trial was held in August, 1972.

At the trial, two expert diabetes specialists testified that Dr. Ralston's opinion was one hunderd percent contrary to medical knowledge and that Scott's oral medication did not pose any real danger for a driver (333, 334, 350-53, 390-93) and that Scott was qualified under the standards which the ICC was using. Those practices appear in the current ICC regulations:

> "If mild diabetes is noted at the time of the examination and is stabilized by use of a hypoglycemic drug and a diet that can be obtained while a driver is on duty, it should not be considered disqualifying (Section 391.43 (c), Title 49, Chapter I, Part 391, Subpart E)."

The company did not offer any expert medical opinion to refute plaintiff's experts.

At trial, Mr. Baccei, the ex-ICC man, admitted telling Dr. Ralston that oral medication should not be considered disqualifying (462). He also admitted that the ICC made no ruling in Scott's case (463). At trial, it was shown that another driver, Jones, who had more severe diabetes than Scott, was temporarily disqualified for a few days by Dr. Ralston but was not fired and was subsequently qualified (93-95, 220-221, 615).

Thus, there was powerful evidence of a pretextual discriminatory discharge. The jury could have found that Scott was fired because he was a "trouble maker" and not because of diabetes.

Plaintiff argued that, as a matter of law, he had satisfied the requirements of the *Republic Steel* v. *Maddox*, 392 U.S.

652 (1969), since Scott had clearly made a good faith "attempt to use the contract grievance procedure" and he afforded the union every "opportunity to act on his behalf." Defendants disagreed, arguing that Scott had not followed the contract procedures in a timely manner. The Court submitted the timeliness and exhaustion issues to the jury.[2] The jury agreed with plaintiff's version of the facts and also found that the union had breached its duty of fair representation.

The jury found the company discharged plaintiff without just cause and returned a verdict of $12,500.00 from which judgment defendant Anchor now appeals.[3]

ARGUMENT

A. THERE WAS NO CONFLICT BETWEEN THE JUDGMENT OF THE COURT AND THE RULES OF THE I.C.C.

Scott claimed that he was unjustly discharged in breach of the labor agreement which provides that the employer shall not discharge an employee "without just cause" and that if there is an "injustice" the employee shall be reinstated (Article 32, 608).

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[2] For another case where the exhaustion issue was submitted, to the jury see: *Smith* v. *Pittsburgh Gage & Supply Co.*, 464 F.2d 870 (CA 3, 1972).

[3] The trial consolidated plaintiff's separate claim against the union for unfair representation. The jury returned a verdict for $12,500.00 against the union. The Court of Appeals affirmed the judgment of liability but ordered a new trial on the issue of damages and attorney fees. The union has indicated an intent to petition this Court concerning the damage issue. (Case No. A-1348)

Any question of medical fitness for work is subject to the grievance and arbitration procedures (Article 34; 609, 117-118). Arbitrators, as a matter of course, review questions of medical fitness in cases where truck drivers subject to ICC regulations have been discharged, *Texas Lime*, 49 L.A. 403 (Emery, Arbitrator, 1967), *Expert Dairy Service, Inc.*, 45 L.A. 217 (1965), *Spector Freight System, Inc.*, 34 L.A. 149 (1960), *Fontaine Truck Equipment Co.*, 38 L.A. 829 (Petree, Arbitrator, 1962), *Associated Transport, Inc.*, 32 L.A. 152 (Campbell, Arbitrator, 1959). In a Section 301 breach of contract case, the court and jury perform the functions normally performed by the arbitrator.

Defendant's position, that the unilateral and clearly erroneous determination of a company controlled doctor shall govern the issues in this case as a matter of law, is completely at odds with well settled principles of labor relations subjecting such decisions to legal review under the contract grievance machinery. See, for example, *Ideal Cement Co.*, 20 L.A. 480 (Merrill, Arbitrator, 1953) (an employee cannot be summarily discharged simply on the basis of a letter from a company physician), *Instant Milk*, 24 L.A. 756 (Anderson, Arbitrator, 1955) ("management must accept the responsibility" where "a medical examination given by the company's physician is proved to be mistaken.")

The employer argued to the jury and now to this Court that it was "compelled" by the ICC to discharge Scott and forever deprive him of this seniority and pension rights. The jury rejected the employer's version of the facts and agreed with plaintiff that the "ICC" defense was pretextual and plain nonsense. Scott was fired, not because of diabetes or ICC rules, but because of Anchor's desire to rid itself of a fighter who stood up for his contractual rights. There was a mountain of evidence that Dr. Ralston's opinion was coerced and was fraudulent, and that Anchor

never really believed that Scott was unfit under ICC rules. Furthermore, the uncontradicted medical testimony showed that the taking of oral medication does not create a safety problem, and that a mild diabetic, like Scott, who is well controlled, did, in fact, meet ICC criteria. Thus, there was no conflict between contractual and ICC obligations.

A case directly in point is *International Auto Sales* v. *Local 270,* 313 F. Supp. 313 (E.D. of La., 1970). The arbitrator found that a discharged employee was medically fit under ICC rules and that the employer's purpose in requiring a physical examination was "a subterfuge to rid themselves of an employee who they decided they could do best without." As in the case at bar, company officials wrongfully instructed the doctor to find the employee not qualified. The court refused to vacate the arbitration award, in spite of the company's argument that the arbitrator's order of reinstatement would cause the company to violate ICC safety regulations.

The case of *Miller* v. *ICX,* 358 F. Supp. 1378 (D.C. Ill., 1972) cited by defendant actually helps plaintiff's position. In *Miller,* plaintiff had a history of diabetes "which required insulin for control." Insulin using diabetics are disqualified under ICC rules (461). Scott, unlike Miller, never used insulin and he was therefore not subject to insulin shock or convulsions. Scott, as a mild, non-insulin using diabetic, was qualified by under ICC rules (333-353, 391-393). In additioni, there was no evidence in the *Miller* case of a pretextual discharge or improper attempts to coerce a doctor in order to get rid of an employee disliked and unwanted for reasons unrelated to medical fitness.

Furthermore, the issues under ICC rules as to driving and the issues under the labor agreement are not identical. Anchor's arguments overlook the obvious fact that ICC rules do not require or even discuss discharge or loss of

seniority rights. The normal employer disposition of a health problem would be a temporary suspension or leave of absence in order for the employee to become rehabilitated, as was done in the case of diabetic Jones (93-95, 615). However, Anchor summarily discharged Scott without such consideration or any attempt to find him temporary light work or a non-driving position as a yard or dock man while receiving treatment. Furthermore, the ICC never made any ruling or issued any order concerning Scott, and in fact his ICC certificate has never been revoked.

The decision of the court and jury is totally in harmony with ICC regulations and there is no conflict of any kind presented by this record.

B. PLAINTIFF MADE A REASONABLE ATTEMPT TO INVOKE THE GRIEVANCE PROCEDURE.

Defendant concedes on page 23 of its brief that "where the union has sole and exclusive control over access to steps of the grievance machinery and where unfair representation is proven, an employee is entitled to some protection." Such concession of course, is required by the language of this court in *Vaca*:

> "We think that another situation where the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure *and* if as is alleged here, the employee plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance.
>
> * * *
>
> "For these reasons we think the wrongfully discharged

> employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contract remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." *Vaca* v. *Sipes*, 386 U.S. at 171.

In the case at bar, the "*union*" (not the employee) had the sole and exclusive right to request a "hearing" as to an employee's discharge (Article 32, 608). The contract speaks of the "employee's right (not on his own, but) through the *union* to challenge a penalty through the regular grievance procedure" (611). Article 34 gives the *union* (not the employee) the right to obtain a medical examination if the *union* (not the employee) believes there is an injustice (609). Thus, the *union* (not the employee) controlled all the steps of the grievance procedure by which Scott could protest a wrongful discharge because of alleged medical unfitness.

The jury correctly concluded that Scott, by mailing several copies of his grievance by certified mail, well within the ten day period, had substantially satisfied the contract's requirements concerning the taking of an appeal under Article 32. At the time of his discharge, there was no steward and no union committee available to help Scott. In addition, the terminal was shut down and the other union members were on vacation. By filing copies of his grievance with the union, Scott followed normal practice and took the most logical and reasonable step to ensure that his grievance would receive a hearing. Since the union controlled the employee's ability to protest the discharge penalty, obtain a hearing and obtain an impartial medical examination, Scott's efforts directed toward the union constituted a reasonable attempt to comply with the contract under the *Maddox-Vaca* doctrine.

It is true that the *Vaca* doctrine may result in the employer being faced with a lawsuit, without prior notice in the grievance procedure. The reason for the exception to the exhaustion doctrine was stated by this court in *Vaca*:

> "Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in enforcement of such agreements." 386 U.S. 186.

Post-*Vaca* cases have excused employees from rigid compliance with the technicalities of grievance procedures, where, as here, there is a breach of fair representation, *Retana* v. *Apt., Motel and Elevator Operators Union Local 14,* 453 F.2d 1018, (CA 9, 1972), *DeArroyo* v. *Sindicato de Trabajordes Packinghouse,* 425 F.2d 281 (CA 1), cert. denied 400 U.S. 877 (1970), *Williams* v. *Dana Corp.,* 442 F.2d 412 (CA 6, 1971), *Schum* v. *South Buffalo Railway Co.,* 73 L.C. 14,492 (CA 2, April, 1974). In all of the above cases, the employee filed his grievance with the union, but not the employer and the court nevertheless found standing to sue the employer because of the unfair representation. The rationale stated in *Schum* applies with equal force in the Scott case:

> "Here Schum properly invoked the union's power, aid and prestige to obtain the benefits of union representation in his protest against the wrongful discharge. Reassured on several occasions by union officials that his grievance would be processed administratively, Schum understandably left the matter in the hands of the union. He did not learn of the union's lack of diligence until months after he had lost the right to resort to the contractually-prescribed procedures on his own. Under these circumstances, Schum cannot be denied his day in court against his employer be-

cause his union failed to provide his fair representation. As stated by the Supreme Court in *Vaca*:

> 'It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice.' . . . 386 U.S. 185-186."

The employer cannot seriously complain of prejudice in the case at bar. Anchor was verbally notified of Scott's protest on the day after his discharge when he visited the company premises (234), and again when the union inquired concerning his case in August, 1966 and finally in 1967 when Scott wrote the company (617). Anchor made no inquiries or efforts to contact Scott. In addition, the employer, which (1) maintained a "sweetheart", collusive relationship with the union, (2) violated the procedures of the labor agreement by failing to issue a pre-discharge warning notice (Article 32, 608), and (3) acted fraudulently with respect to the discharge, is estopped from complaining concerning any technical deficiencies. In addition, the bad faith posture of both employer and union during this period when the grievance machinery was inoperative, brings into play the "futility" doctrine set forth in *Glover* v. *St. Louis-S.F. Ry.*, 393 U.S. 324 (1969) ("where the effort to proceed formally with the contractual or administrative remedies would be wholly futile.")

Scott is a third party beneficiary of the employer's prom-

ise to treat its employees with justice. It is only because of the union-sponsored grievance machinery that the "exhaustion" requirement was developed. Where the machinery breaks down, where the union fails to provide fair representation or where collusion and employer bad faith renders utilization of the procedure futile, the reason and purpose behind the necessity for the exhaustion rule vanish. So it was in the Scott case. The aggravated fact pattern — showing hostility and bad faith on the part of both the employer and the union — provides a classic example of why an employee should be allowed to sue on the contract under the *Vaca* doctrine.

C. THIS APPEAL FROM A JURY VERDICT IS INAPPROPRIATE FOR CERTIORARI.

The basic issues in this case were factual, not legal. Defendant says there was a conflict between the ICC and the court. Yet the ICC made no determination of any kind as to Scott's fitness. In addition, there was no medical testimony refuting plaintiff's two experts who testified that Scott's condition did not present safety problems or violate ICC standards. Furthermore, there was evidence that Scott's discharge was pretextual and completely unrelated to health or ICC regulations. Thus, the purported conflict between ICC law and the law of labor agreements, which defendant claims might be of interest to this Court, is not even present in the case at bar.

Similarly, no important issue concerning exhaustion of remedies doctrine is posed in this case. Exhaustion is not required where, as here, union unfair representation prevents the employee from obtaining relief under a union-controlled grievance procedure. In any event, the jury

found that Scott complied with the contract's provisions concerning timeliness of appeal. Thus, the jury, in effect found that Scott did exhaust grievance remedies. In view of the jury finding of unfair representation and the cases allowing suit for breach of contract under these circumstances, this appeal presents no new, unusual or important issues for this Court.[4] Furthermore, the decision of the court below is not in conflict with any decision of this Court, and there is no conflict of law between the Circuits on the rules of law governing this case.

CONCLUSION

This record displays one of the most flagrant cases of wrongful discharge and unfair representation in the annals of post-*Vaca* reported cases. Evidence of collusion and subjective bad faith on the part of both company and union officials permeate the transcript.

The jury could have found a pretextual bad faith discharge in which the company deliberately pressured its doctor to alter his professional opinion to produce a result one hundred percent at odds with medical knowledge. There was no conflict between ICC rules under which Scott as a mild, non-insulin using diabetic, had been qualified for years, and the labor agreement, which requires an employer to treat his employee justice. Under *both* ICC and contract rules, Scott was a qualified driver and was treated unjustly by Anchor.

Scott, by filing his grievance with the union, followed normal practice. Since the union had control of his ability

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[4] The questions defendant seeks to present in its third and fourth arguments were not raised in the court below and are so obviously inappropriate for certiorari and so obviously frivolous as to not deserve reply.

to obtain relief under the contract, filing with the union constituted a reasonable attempt to exhaust remedies. The jury's findings of (1) unfair representation and (2) timely compliance with the grievance procedure allows plaintiff to sue for breach of contract under the principles set forth by this Court in *Vaca, Maddox* and *Glover*.

No important legal issues are raised by this appeal from a jury verdict involving questions of fact.

For all these reasons, the petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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